

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KEVIN M. CARTER)	
Claimant)	
VS.)	
)	
WATER DISTRICT NO. 1 OF JOHNSON COUNTY)	Docket No. 1,066,972
Respondent)	
AND)	
)	
CRUM AND FORSTER INDEMNITY COMPANY)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the September 10, 2014, Preliminary Order entered by Administrative Law Judge (ALJ) Steven J. Howard. Zachary K. Mark of Mission, Kansas, appeared for claimant. Ryan D. Weltz of Overland Park, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 9, 2014, preliminary hearing; the transcript of the September 5, 2014, deposition of Dr. Daniel J. Stechschulte, Jr., and exhibits thereto; the May 7, 2014, report by Dr. Charles E. Rhoades; and all pleadings contained in the administrative file.

ISSUES

Respondent filed its Application for Review on September 10, 2014. On the same day, the Board issued an Acknowledgment of Application for Review and Briefing Schedule that indicated appellant's (respondent's) brief was due on September 22, 2014. On September 26, 2014, respondent filed its brief to the Board along with a Motion to File Brief Out of Time/Instanter. The motion indicated respondent did not calendar its briefing deadline and was late in submitting its brief. Claimant, also on September 26, 2014, filed a Response to Motion to File Brief Out of Time/Instanter, objecting to respondent filing its brief out of time.

At the preliminary hearing, claimant requested authorization for Dr. Charles E. Rhoades to perform an arthroscopy to remove loose bodies from claimant's right knee. Dr. Rhoades opined claimant's work accident was the prevailing factor causing his need for a right knee arthroscopy. The ALJ did not make a specific finding that claimant's work accident was the prevailing factor causing his need for a right knee arthroscopy. However, the ALJ implied claimant's work accident was the prevailing factor causing his need for a right knee arthroscopy by authorizing Dr. Rhoades to perform the arthroscopy to remove loose bodies, requiring respondent to pay for the surgery and ordering respondent to pay temporary total disability benefits during the period claimant is unable to work following the surgery.

Respondent appeals and argues claimant had preexisting right knee degenerative arthritis and failed to prove his work accident was the prevailing factor causing his injury and need for medical treatment. Respondent asserts arthroscopic right knee surgery to remove loose bodies would not cure and relieve claimant from the effects of his workplace injury. Claimant asks the Board to affirm the Preliminary Order and to deny respondent's motion.

The issues on appeal are:

1. Should respondent's Motion to File Brief Out of Time/Instantly be granted?
2. Was claimant's September 3, 2013, work accident the prevailing factor causing his injury and need for a right knee arthroscopy?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Respondent filed its Application for Review on September 10, 2014. On the same day, the Board issued an Acknowledgment of Application for Review and Briefing Schedule that indicated appellant's (respondent's) brief was due on September 22, 2014. On September 26, 2014, respondent filed its brief to the Board along with a Motion to File Brief Out of Time/Instantly. The motion indicated respondent failed to calendar its briefing deadline and was late in submitting its brief. Claimant, also on September 26, 2014, filed a Response to Motion to File Brief Out of Time/Instantly, objecting to respondent filing its brief out of time.

On September 3, 2013, claimant was climbing down a ladder into a hole when his right foot slipped and his right leg went through the ladder rung, suspending him by the right knee until he fell into the hole. Claimant experienced right knee pain and swelling. Claimant testified that prior to the accident, he was physically able to do anything he

wanted at work or at home. He testified Dr. Daniel J. Stechschulte, Jr., and Dr. Rhoades recommended a right knee replacement.

At the request of respondent, Dr. Stechschulte, an orthopedic surgeon, evaluated claimant on January 10, 2014. Dr. Stechschulte's report indicated claimant was 68 inches tall, weighed 237 pounds and had a Body Mass Index of 36.17. The history taken by Dr. Stechschulte from claimant indicated he underwent a right knee arthroscopy with lateral meniscus repair in 1990. Claimant also reported injuring the right knee in 2004, but thought he only had an injection and then got better. Dr. Stechschulte reviewed x-rays of claimant's right knee, which showed no evidence of fracture, dislocation or loose body. The x-rays showed severe loss of joint space laterally and patellofemorally with numerous osteophytes noted throughout the joint. The doctor opined claimant likely would need a right knee replacement, as it was unlikely arthroscopic surgery would offer significant benefit because the majority of claimant's problems appeared to be preexisting degenerative arthritis.

In a February 20, 2014, letter to respondent's attorney, Dr. Stechschulte stated:

Mr. Carter has severe, end stage, pre-existing degenerative arthritis in both his **right** and **left** knees. His work injury of 09/03/13 may have caused an exacerbation of his pre-existing condition. However, 99.9% of his problem in the **right** knee is related to pre-existing degenerative arthritis. Although an MRI may have helped to further clarify the size or donor site of some of the multiple loose bodies identified within his knee on plain x-ray, there is little likelihood that an MRI would change treatment recommendations. Mr. Carter is not at all likely to experience any symptomatic improvement from **right** knee arthroscopy, due to the end stage nature of his pre-existing degenerative arthritis. Mr. Carter needs **bilateral** total knee replacements, but this need is not in any way a result of the work injury of 09/03/13.¹

Pursuant to an agreed order, claimant underwent an independent medical examination by Dr. Rhoades, an orthopedic physician, on May 7, 2014. The history taken by Dr. Rhoades indicated claimant underwent a right knee arthroscopy with lateral meniscus repair in 1990 and he reached maximum medical improvement in February 1991. Dr. Rhoades physically examined claimant and reviewed x-rays of claimant's right knee. His assessments were preexisting right knee advanced degenerative arthritis and right knee locking and catching that was new since claimant's injury. The doctor recommended a right knee arthroscopy for removal of loose bodies. Dr. Rhoades opined the prevailing cause for the need for the arthroscopy was claimant's work-related injury of September 3, 2013. The doctor indicated the prevailing cause for the need for arthroscopy was the fracture of an arthritic osteophyte. Dr. Rhoades also recommended claimant have a right

¹ Stechschulte Depo., Ex. 2.

total knee replacement, but opined the need for the total knee replacement was not related to claimant's work accident.

Dr. Stechschulte was deposed on September 5, 2014. He testified an osteophyte is an abnormal bony protuberance that grows within a joint related to longstanding arthritis. He indicated an osteophyte is a sign of advanced arthritis. The doctor explained a loose body can be any number of things that break off from a location within the knee and are no longer affixed and includes an osteophyte that breaks loose. Dr. Stechschulte testified claimant had multiple osteophytes and multiple loose bodies in his right knee. The doctor indicated claimant was morbidly obese and increased body mass exacerbates and worsens arthritis. He declined to opine it was more probably true than not that claimant's September 3, 2013, accident broke off an osteophyte that lodged somewhere in the cartilage of claimant's right knee, but indicated it was possible.

Dr. Stechschulte testified removal of the loose bodies in claimant's right knee would not help his symptoms, as claimant's arthritis was some of the most advanced and fulminant the doctor had ever seen. The doctor also indicated claimant's need for a right total knee replacement had nothing to do with his work injury. Dr. Stechschulte did not agree that the prevailing factor for the arthroscopic surgery to remove loose bodies from claimant's right knee as Dr. Rhoades recommended was claimant's September 3, 2013, traumatic accident. Dr. Stechschulte testified he also disagreed with the recommendation of Dr. Parmar, claimant's treating physician, that claimant undergo arthroscopic right knee surgery to remove loose bodies.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-523(a) states:

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, ensure the employee and the employer an expeditious hearing and act reasonably without partiality.

The Board grants respondent's Motion to File Brief Out of Time/Instant. Respondent filed its brief to the Board four days late. The Board, under K.S.A. 2013 Supp. 44-523(a), is not bound by the technical rules of procedure. Claimant's objection does not indicate he was in any way prejudiced by respondent filing its brief four days late. Moreover, briefs are considered arguments of counsel and not evidence.

Drs. Stechschulte and Rhoades agree claimant has loose bodies in his right knee. Dr. Rhoades opined the prevailing cause for the need for the arthroscopy was the work-related injury of September 3, 2013, and recommended claimant undergo the arthroscopy. Dr. Stechschulte believed claimant's work accident was not the prevailing factor causing his injury and need for arthroscopy. Additionally, Dr. Stechschulte opined a right knee

arthroscopy would unlikely offer significant benefit to claimant. The ALJ, by ordering the arthroscopic surgery recommended by Dr. Rhoades, apparently thought Dr. Rhoades' opinion was more credible than that of Dr. Stechschulte. This Board Member agrees.

Dr. Rhoades was a neutral physician, while Dr. Stechschulte was an expert employed by respondent. Claimant's right knee was essentially asymptomatic from 2004 until he slipped on the ladder on September 3, 2013. After catching his right leg in the ladder rung, hanging momentarily and falling, claimant had right knee pain and swelling. Dr. Stechschulte declined to opine it was more probably true than not that claimant's September 3, 2013, accident broke off an osteophyte that lodged somewhere in the cartilage of claimant's right knee, but indicated it was possible.

Dr. Rhoades indicated claimant had an osteophyte that formed in the right knee that fractured. Dr. Rhoades opined the prevailing cause for the need for arthroscopy was the fracture of an arthritic osteophyte. This Board Member views Dr. Stechschulte's opinion as claimant possibly could have fractured an osteophyte in the fall, but that the doctor could not say it was more probably true than not that is what happened. Dr. Rhoades, however, was of the opinion claimant fractured an arthritic osteophyte in the work accident and that was the prevailing factor causing claimant's need for right knee arthroscopy.

K.S.A. 2013 Supp. 44-534a(a)(2) grants a judge jurisdiction to decide issues concerning payment of medical compensation and temporary total disability compensation. On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2013 Supp. 44-551 and issues listed in K.S.A. 2013 Supp. 44-534a(a)(2) as jurisdictional issues. Respondent asserts an arthroscopic right knee surgery to remove loose bodies would not cure and relieve claimant from the effects of his workplace injury. That is not an issue over which the Board has jurisdiction.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.³

WHEREFORE, the undersigned Board Member affirms the September 10, 2014, Preliminary Order entered by ALJ Howard.

IT IS SO ORDERED.

² K.S.A. 2013 Supp. 44-534a.

³ K.S.A. 2013 Supp. 44-555c(j).

Dated this ____ day of October, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Steven J. Howard, Administrative Law Judge